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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT BARNARD and BRYAN)
AHRENS, on Behalf of)
Themselves and on Behalf of)
All Others Similarly)
Situated,)
)
Plaintiffs,)
)
vs.) CIVIL ACTION NO. 4:11-cv-02198
)
INTERTEK USA INC D/B/A) JURY TRIAL DEMANDED
INTERTEK CALEB BRETT,)
)
Defendant.)

ORAL DEPOSITION

KEVIN MCFADDEN

FEBRUARY 2, 2012

ORAL DEPOSITION OF KEVIN MCFADDEN, produced as a witness at the instance of the Plaintiffs and duly sworn, was taken in the above-styled and numbered cause on the 2nd day of February, 2012, from 10:28 a.m. to 3:07 p.m., before Anne F. Sitka, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Allen Center, 500 Dallas Street, Suite 3000, Houston, Texas 77002, pursuant to the Federal Rules

EXHIBIT "1"

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1 A. 77586.

2 Q. And how long have you lived at this address?

3 A. Fourteen years.

4 Q. Okay. And what is the business address where you
5 go to work every day?

6 A. 801 Travis Street, Suite 1500, Houston, 77002.

7 Q. Okay. And the company you work for is Intertek?

8 A. Correct.

9 Q. And that's Intertek's main office?

10 A. That's our corporate head office, correct.

11 Q. Okay. Can I get your date of birth?

12 A. 11/21/55.

13 Q. Okay. Do you have a Texas driver's license?

14 A. Yes, I do.

15 Q. And what is that number?

16 A. One of the things I don't remember.

17 19045332.

18 Q. Other than speaking with the lawyer that
19 represents Intertek, did you do anything else to prepare
20 for this deposition?

21 A. No.

22 Q. And did you review any documents?

23 A. No.

24 Q. I'm going to ask you some general background
25 questions. We'll go through that pretty quickly, and then

1 A. I couldn't tell you.

2 Q. Same thing for the Channelview office?

3 A. I couldn't tell you.

4 Q. Okay. Generally speaking what are the duties of
5 a dispatcher?

6 MR. FLESHER: Objection, in our motion.

7 But you can answer if you know.

8 A. Dispatcher, his primary function is to dispatch
9 the inspectors and to be the communications coordinator
10 for the inspector.

11 Q (By Mr. Foy) Okay. And those locations where a
12 dispatcher works, the dispatcher assigns the jobs to the
13 inspectors; is that correct?

14 A. Frequently, yes.

15 Q. Okay. Does the dispatcher do any
16 inspection services?

17 A. Yes, he does.

18 Q. How often does he do inspection services?

19 A. It varies from location to location; but
20 typically the dispatcher, if things are particularly busy
21 and there's no available inspectors, he's the next one to
22 go in the field.

23 Q. But normally the dispatcher just does the
24 dispatch services, correct?

25 A. No, in some locations he frequently does

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1 inspection work as well.

2 Q. What locations are those?

3 A. I couldn't --

4 MR. FLESHER: Objection.

5 If you know.

6 A. I couldn't tell you specifically, but they do do
7 that.

8 Q (By Mr. Foty) Okay. I mean, who does more
9 traveling, the inspector or a dispatcher?

10 MR. FLESHER: Objection.

11 A. What do you mean by travel?

12 Q (By Mr. Foty) What do you think I mean by
13 traveling? Who does more driving as part of their work
14 for Intertek, an inspector or a dispatcher?

15 MR. FLESHER: Same objection.

16 A. We would assume the inspector.

17 Q (By Mr. Foty) Okay. Are there different types of
18 dispatchers?

19 MR. FLESHER: Objection.

20 A. No. What do you mean by "different types"?

21 Q (By Mr. Foty) I mean is there a -- well, I don't
22 know. I mean, if you can't answer the question, then
23 obviously there's not a different type of dispatcher.

24 MR. FLESHER: Objection. Was that a
25 question?

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1 Q (By Mr. Foty) You can answer the question.

2 A. Oh, sorry.

3 But he also has to give the instructions to
4 the inspector. He is the first call that the inspector
5 makes if there's an issue; so, he has to be qualified
6 to -- technically qualified to talk the inspector through
7 if there's any issues. He also has to talk to the
8 customer. So, there are different levels of dispatchers.

9 Q. And, you know, what each person knows may be
10 different; but the general duties of a dispatcher are the
11 same, to give information about the jobs to an inspector,
12 correct?

13 MR. FLESHER: Objection, asked and answered.

14 A. In its most general terms, yes.

15 Q (By Mr. Foty) Okay. Like the inspectors, do the
16 dispatchers get paid on an hourly rate basis?

17 A. I believe so.

18 Q. Okay. Are you aware of any distinctions amongst
19 the pay of the inspectors versus the dispatchers?

20 MR. FLESHER: Objection.

21 But you can answer.

22 A. I'm not aware of any.

23 Q (By Mr. Foty) Okay. So, a dispatcher gets paid
24 like an inspector?

25 A. He gets paid, yes.

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1 employee, which could include but are not limited to
2 expenses such as depreciation or lease payments,
3 insurance, registration and license fees, personal
4 property taxes, et cetera."

5 Did I read that correctly?

6 A. Yes.

7 Q. Is that what the auto allowance is intended to
8 compensate?

9 A. If this is referencing auto allowance -- is this
10 referencing auto allowance?

11 Q. Yes, it is.

12 A. -- then that's what it was intended to reimburse
13 the inspector for.

14 Q. So, the auto allowance is to cover fixed costs,
15 correct?

16 A. It's to reimburse the inspector for the use of
17 his vehicle; and I'm assuming that a fixed cost on a
18 vehicle, as you know if you have one, is not all the same
19 every month. Maintenance can vary.

20 Q. And part of the fixed cost that the auto
21 allowance is intended to compensate is insurance; is that
22 correct?

23 A. I believe so, yes.

24 Q. Okay. So is the registration and license fees,
25 correct?

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1 A. I believe so, yes.

2 Q. And so is personal property taxes?

3 A. I believe so, yes.

4 Q. And lease payments, correct?

5 A. I believe so, yes.

6 Q. Do the inspectors have to submit any receipts to
7 be reimbursed for those categories?

8 A. For the auto allowance?

9 Q. Yes.

10 A. No.

11 Q. Do the inspectors have to provide anything to
12 Intertek to prove that they incurred those expenses?

13 A. No.

14 Q. Now, Intertek compensates the inspectors through
15 the auto allowance for car insurance, correct?

16 A. It's one of the things the auto allowance is
17 meant to reimburse the inspector for.

18 Q. Car insurance is something that the inspectors
19 would have incurred regardless of working for Intertek; is
20 that correct?

21 A. One would assume so, yes.

22 Q. Okay. Intertek does not require that the
23 inspectors purchase a certain type of insurance, correct?

24 A. Intertek requires that the inspectors have
25 insurance on their vehicle.

1 Q. Which is also state law, though, correct?

2 A. It's also a requirement for the inspector to have
3 insurance on his vehicle.

4 Q. Intertek does not require a certain type of
5 insurance, though?

6 A. I can't answer that specifically. I don't
7 recall, but I know we do require them to have insurance on
8 their vehicle.

9 Q. Okay. Well, you don't require them to purchase
10 the insurance through Farmers or GEICO, correct?

11 A. No.

12 Q. And it's not like Intertek has negotiated some
13 rate with an insurance provider like GEICO or Farmers so
14 that the inspectors can then purchase that insurance
15 through that company, correct?

16 A. Correct.

17 Q. And an inspector does not have to get a
18 commercial driver's license to work for Intertek, correct?

19 A. Correct.

20 Q. And they don't have to get a commercial insurance
21 policy, correct?

22 A. Correct.

23 Q. Does Intertek require more insurance than what is
24 required by state law?

25 A. I don't believe so.

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1 A. It's intended to reimburse the inspector for the
2 use of his private vehicle, yes.

3 Q. Now, did Intertek -- including registration and
4 license fees, correct?

5 MR. FLESHER: Objection, asked and answered.

6 A. Including all the expenses associated with using
7 your own private vehicle, yes.

8 Q (By Mr. Foty) Which includes registration and
9 license fees?

10 MR. FLESHER: Objection, asked and answered.

11 Q (By Mr. Foty) Correct?

12 A. Yes, it does, all the inspection.

13 Q. Intertek did not negotiate a lower rate with the
14 state of Texas for registration and license fees for its
15 employees, correct?

16 A. Correct.

17 Q. So, an Intertek employee pays the exact same that
18 any other person would for a registration and license fee,
19 correct?

20 A. I would assume so, yes.

21 Q. Okay. Personal property taxes, that's something
22 that also Intertek compensates the inspectors, correct?

23 MR. FLESHER: Objection, asked and answered.

24 A. If the auto allowance that we pay inspectors is
25 used to pay for the personal property taxes on the

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1 vehicle, yes, you are correct.

2 Q (By Mr. Fotsy) You would agree that those are
3 purely personal to the employee?

4 MR. FLESHER: Objection.

5 A. They're part of the cost of the employee
6 providing the vehicle. Yes, you are correct.

7 Q (By Mr. Fotsy) Lease payments, now that's the cost
8 to actually operate a vehicle, correct?

9 A. That's the cost of paying for the vehicle, yes.

10 Q. Okay. Now, the auto allowance is intended to
11 compensate for the lease payments, correct?

12 MR. FLESHER: Objection, asked and answered.

13 A. The auto allowance is intended to compensate for
14 all expenses of providing a personal vehicle, which may
15 include lease payments and bank payments, yes.

16 Q (By Mr. Fotsy) Okay. Now, if I were an Intertek
17 inspector and I'm leasing my vehicle, I could use that
18 vehicle to buy groceries that are purely personal to me,
19 correct?

20 MR. FLESHER: Objection.

21 A. You are correct.

22 Q (By Mr. Fotsy) I could go to the movies in that
23 car, right?

24 MR. FLESHER: Objection.

25 A. Correct.

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1 Q (By Mr. Foyt) I could go to a ballgame in that
2 car, correct?

3 MR. FLESHER: Objection.

4 A. Correct.

5 Q (By Mr. Foyt) I could take a vacation in that
6 car, correct?

7 MR. FLESHER: Objection.

8 A. Correct.

9 Q (By Mr. Foyt) And the cost to have that car is
10 compensated by Intertek, correct?

11 A. Correct.

12 MR. FLESHER: Objection.

13 Q (By Mr. Foyt) Do dispatchers receive a different
14 amount for the auto allowance than the inspectors?

15 A. I don't believe so.

16 Q. Okay. So, they receive the same amount?

17 A. I believe so.

18 Q. Okay. So, even though the inspectors drive their
19 vehicles more than the dispatchers do, they both receive
20 the same amount for the auto allowance?

21 MR. FLESHER: Objection.

22 A. The auto allowance is designed to reimburse them
23 for the provision of the vehicle. Dispatchers have to
24 provide a vehicle, too, as well. So, yes, it's designed
25 for the same.

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1 Q (By Mr. Fotypy) So, even if there was a dispatcher
2 that only drove his vehicle one day as part of his duties
3 for Intertek, he would still receive the same auto
4 allowance as the inspector who drives every day; is that
5 correct?

6 MR. FLESHER: Objection.

7 You can answer if you know.

8 A. That's correct.

9 Q (By Mr. Fotypy) When was the auto allowance first
10 enacted?

11 A. It's been in the company as long as I've been in
12 the company.

13 Q. So, you don't know who decided the auto
14 allowance?

15 A. No idea.

16 Q. How are the rates decided?

17 A. The rate, the current rate, I believe was changed
18 sometime in 2005; but prior to that I couldn't tell you
19 when the -- who decided on the rates.

20 Q. Okay. Who made the change -- who made the
21 decision to change the rate in 2005?

22 A. It was a general discussion in a managers meeting
23 that given the costs of providing a vehicle, given the
24 cost of increased insurance and maintenance, that it was
25 past time to increase the auto allowance.

1 Q. And what was it increased to?

2 A. I believe it was increased to 350.

3 Q. A month?

4 A. A month.

5 Q. And before that it was what amount?

6 A. I believe it was 300 a month.

7 Q. And who took part in that decision?

8 A. I don't recall specifically. I recall -- if
9 memory serves me correctly, it was a managers meeting
10 sometime in 2005. I can't recall the specific attendees.

11 Q. Was it managers of -- all managers throughout
12 Intertek?

13 A. It was -- again, I can't remember who was there;
14 but it was a managers meeting. So, a good grouping of the
15 branch managers were all in attendance.

16 Q. Did you take part in that meeting?

17 A. Yes, I believe I was in the meeting.

18 Q. Okay. And what studies did you rely upon -- did
19 everybody rely upon, if any, to make the decision to
20 increase the auto allowance?

21 A. There was no studies made.

22 Q. Was it just, hey, let's just change it to 350 a
23 month? Was it --

24 A. I believe it was the general feeling that it was
25 time to increase it given the fact that the cost of

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1 A. I really can't. I'm sorry.

2 Q. So, that meeting that was held in 2005, the
3 decision to increase the auto allowance by \$50 was not
4 based upon any studies about changes in car insurance
5 rates or registration and license fees or lease payments
6 for vehicles or personal property taxes for vehicles,
7 correct?

8 A. No.

9 Q. In addition to the auto allowance, Intertek pays
10 its inspectors a mileage reimbursement?

11 A. Yes.

12 Q. Why does Intertek pay both the mileage
13 reimbursement and the auto allowance to its inspectors?

14 A. The auto allowance is designed to reimburse the
15 inspector the cost of providing the vehicle. The mileage
16 allowance is designed to reimburse the inspector for the
17 daily costs of driving the vehicle, primarily gasoline.

18 Q. Isn't it Intertek's policy to either provide the
19 auto allowance or the mileage reimbursement to the
20 inspector and not both?

21 A. No. To the best of my knowledge, we've always
22 provided both.

23 (Exhibit 9 marked)

24 Q. (By Mr. Foty) I'm going to go ahead and hand you
25 Exhibit 9 to this deposition, which is Intertek 10747 to

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1 There may not be any relieving, and they may
2 have had a chance to go home for a break if a ship is
3 loading or discharging or the job is finished and they are
4 doing the same for another job.

5 Q. What is the longest number of hours that Intertek
6 requires its inspectors to work continuously?

7 A. We don't have a set policy.

8 Q. Okay. Well, what is the longest number of
9 hours -- well, strike that.

10 When do the inspectors get a break if they
11 are on that on-call system?

12 MR. FLESHER: Objection.

13 But you can answer.

14 A. There is no defined break time.

15 Q (By Mr. Fotsy) Well, how does it work? Give me an
16 example of the on-call system where -- just give me a
17 hypothetical where --

18 A. Hypothetical, if an inspector is assigned to work
19 a ship that's coming into, say, Vopak at Pasadena, we will
20 get a call from the terminal an hour or two hours before
21 the ship's arriving. Dispatch will notify the inspector.
22 The inspector who's assigned to that job -- or inspectors
23 who are assigned to that job will be out there at the time
24 the terminal has said for them to be there, and they will
25 be assigned to that job until that job is finished.

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1 Q. What if it takes 48 hours?

2 A. If it takes 48 hours, it takes 48 hours.

3 Q. And they will --

4 A. But they will -- there are times when an
5 inspector will be able to home during that period.

6 There's not always something happening during that time.

7 Q. And so, they get to go home?

8 A. They get to go home.

9 Q. Okay. And then after they go home, sleep, they
10 go back?

11 A. Correct.

12 Q. Okay. Now, the inspectors are not staying
13 overnight at a hotel when they're on that on-call system?

14 MR. FLESHER: Objection.

15 You can answer.

16 A. Usually not, no.

17 Q. (By Mr. Foty) I mean, they go back to their
18 homes?

19 A. Yes.

20 Q. Okay. Now let's go back to that meeting that we
21 talked about in 2005. Was the purpose of the meeting to
22 discuss raising the auto allowance, or was there other
23 stuff that was discussed?

24 A. It would be a general managers meeting; so, it
25 wouldn't -- it wasn't for that particular purpose, no.

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1 But you can answer.

2 A. I'm not aware of any.

3 Q (By Mr. FOTY) And, likewise, you're not aware of
4 any for the 350-dollar allowance as well, correct?

5 A. Correct, I'm not aware of any.

6 MR. FOTY: All right. I think we're at a
7 good stopping point. So, let's go off the record.

8 (Lunch recess taken)

9 Q (By Mr. FOTY) Okay. Back on the record.

10 Mr. McFadden, before we took a lunch break,
11 we were talking about the mileage reimbursement and the
12 auto allowance, correct?

13 A. Yes.

14 Q. The auto allowance covers lease payments to a
15 car. It covers license and registration fees for the car.
16 It covers car insurance. It covers personal property
17 taxes. Does it cover anything else?

18 MR. FLESHER: You mean the auto allowance?

19 MR. FOTY: The auto allowance.

20 A. It covers all the expenses an employee would have
21 in providing their vehicle fees for their job.

22 Q (By Mr. FOTY) And what are those expenses?

23 A. The ones that you've listed.

24 Q. Okay. The mileage reimbursement is to cover --
25 strike that.

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1 Both the mileage reimbursement and the auto
2 allowance are to cover expenses that the employee incurs
3 when driving a vehicle, correct?

4 A. In essence, correct. Auto allowance is for the
5 monthly expenses. The mileage allowance is for the daily
6 running expenses.

7 Q. Does Intertek do any analysis to determine how
8 many miles were driven by an employee for personal
9 purposes versus for business purposes?

10 A. No. The employee reports the miles that they
11 drive for the business expenses.

12 Q. And so, those records should be in Intertek's
13 possession?

14 A. The records, those are the -- if the employee
15 turned them in to claim reimbursement, then the record
16 should be in Intertek's possession.

17 Q. But those would be the only records?

18 A. As far as I'm aware, yes.

19 Q. The 350-dollar auto allowance is the same for all
20 inspectors and dispatchers?

21 A. I believe so.

22 Q. Now, \$350 a month comes to -- I'm going to do the
23 math right now on my calculator. \$350 a month comes to
24 \$4,200 per year.

25 A. Not having the benefit of a calculator, I'll take

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1 working.

2 Q. If an employee works a shift and takes a lunch
3 break, they receive money from Intertek to pay their
4 lunch, correct?

5 A. Correct.

6 Q. Typically inspectors and dispatchers receive a
7 one-hour lunch break; correct?

8 A. Actually, no.

9 Q. What is their lunch break?

10 A. It varies. Inspectors, as we discussed earlier,
11 their job when working is on the requirements of the
12 client. So, there's no set break time that an inspector
13 can be assigned at any one time.

14 Q. But they are guaranteed at least a 30-minute to
15 one-hour break, correct?

16 A. No.

17 Q. So, an employee can work a 12-hour shift straight
18 without ever taking any break?

19 A. No. That's not what I understood your question
20 to be.

21 Q. Okay. I guess my question is: In every shift
22 that an inspector or a dispatcher works, he gets a break
23 for lunch?

24 A. Inspector --

25 MR. FLESHER: Objection.

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1 But go ahead.

2 A. Inspectors manage their own time. Inspectors
3 record their own time. Inspectors are trusted to manage
4 their own breaks.

5 Q (By Mr. Foty) But Intertek allows them to take
6 how much time for breaks?

7 MR. FLESHER: Objection.

8 A. We can't dictate -- sitting in an office --
9 dictate that "on that particular day, you will take a
10 particular amount of time for a break." So, we won't
11 control what the shift does or what the barge does.

12 Q (By Mr. Foty) But they are expected to take
13 breaks to go eat lunch?

14 MR. FLESHER: Objection.

15 A. They are expected to manage the time in which
16 they have the opportunity to take a break for lunch and
17 take a break.

18 Q (By Mr. Foty) And when they do take that lunch
19 break, they can go eat at any restaurant that they want
20 to, correct?

21 A. I would imagine so.

22 Q. I mean, they can choose to go eat at McDonald's
23 or Burger King, Wendy's. It doesn't matter?

24 A. I would imagine so.

25 Q. There aren't any restrictions on where they can

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1 go eat.

2 MR. FLESHER: Objection.

3 Q (By Mr. Fotypy) Correct?

4 A. Correct.

5 Q. And just like any other job, they can buy their
6 lunch if they please, correct?

7 MR. FLESHER: Objection.

8 A. Correct.

9 Q (By Mr. Fotypy) And as you said, Intertek gives
10 them money for their lunch, correct?

11 A. Employee is the one who tells us that he had to
12 buy a lunch or a meal while he's working and he records it
13 and we reimburse him for that expense, correct.

14 Q. But the employee does not -- including the -- the
15 inspectors and dispatchers, they don't have to submit
16 receipts?

17 A. No.

18 Q. They just include it on the job voucher?

19 A. That's correct.

20 (Exhibit 10 marked)

21 Q (By Mr. Fotypy) I'm handing you what has been
22 marked as Exhibit 10 to this deposition. Exhibit 10 to
23 this deposition is the job voucher policies for Intertek,
24 correct?

25 MR. FLESHER: Just to clarify: You're

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1 A. I don't know. I'd have to look at the policy.

2 Q (By Mr. Foty) Okay. Now it's your understanding
3 that a person's personal insurance does not cover the
4 person if they are using the vehicle in the course and
5 scope of their employment, correct?

6 MR. FLESHER: Objection.

7 A. I don't know what individual insurance policies
8 the inspectors have.

9 Q (By Mr. Foty) Okay. Has Intertek ever required
10 the inspectors or the dispatchers to purchase commercial
11 general liability insurance for their vehicles?

12 A. Not as far as I'm aware.

13 Q. So, the insurance that is compensated by Intertek
14 is purely personal insurance, correct?

15 MR. FLESHER: Objection.

16 A. It's insurance for the vehicles, whatever the
17 inspectors have on their vehicle.

18 Q (By Mr. Foty) And that's purely personal
19 insurance, correct?

20 MR. FLESHER: Objection.

21 A. It's insurance for that vehicle.

22 Q (By Mr. Foty) And that insurance covers the
23 inspector when they are driving to the movies, correct?

24 A. It covers the inspector when he's driving his
25 vehicle.

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1 Q. And that includes driving to the movies or on a
2 vacation, correct?

3 A. And driving to the terminal, yes.

4 Q. Do you know whether or not that personal
5 insurance covers the inspectors for driving within the
6 course and scope of their employment for Intertek?

7 MR. FLESHER: Objection.

8 Q (By Mr. Foy) Do you know that?

9 A. I have no idea.

10 Q. Did Intertek make any effort to determine what
11 percentage of any insurance premium for the vehicles was
12 for business use as opposed to personal use each month?

13 A. I have no idea.

14 Q. Did Intertek make any determination as to what
15 percentage of the automobile license and registration fees
16 were for business use as opposed to personal use?

17 A. I have no idea.

18 Q. Did Intertek take any effort to determine what
19 percentage of the property taxes was for supposed business
20 use as opposed to personal use each month?

21 A. No idea.

22 Q. Did Intertek take any effort to determine what
23 percentage of any supposed lease payments was for -- was
24 to be used for business purposes as opposed to personal
25 purposes each month?